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No. 380

Supreme Court of the United States

(October Term, 1952)

Pennington-Winter Construction Company,
a corporation,
Petitioner,

VERSUS

Maurice J. Tobin, Secretary of Labor,
United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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No. .....

In the
Supreme Court of the United States
(OCTOBER TERM, 1952)

PENNINGTON-WINTER CONSTRUCTION COMPANY,
a corporation,
Petitioner,

VERSUS

MAURICE J. TOBIN, Secretary of Labor,
United States Department of Labor,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Pennington-Winter Construction Company, a corporation, hereinafter called "Petitioner", respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Tenth Circuit, rendered on the 2nd day of July, 1952, wherein the Court of Appeals reversed the judgment of the District Court. On August 2, 1952, a timely Petition for Rehearing was denied. On the 4th day of September, 1952, upon application of counsel for petitioner,

the Court of Appeals granted an extension of time within which to file Petition for Writ of Certiorari to and including the 10th day of October, 1952.

JURISDICTION

The jurisdiction to review this case upon Writ of Certiorari is conferred upon this Court by 28 U. S. C. 1254(1).

The opinion of the Court of Appeals for the Tenth Circuit was filed on July 2, 1952, and a Petition for Rehearing was denied on August 2, 1952.

OPINIONS BELOW

The judgment of the District Court, together with the Findings of Fact and Conclusions of Law appear in the Transcript of Record at pages 6-13, inclusive. The opinion of the Court of Appeals of the Tenth Circuit, styled *Maurice J. Tobin, Secretary of Labor, United States Department of Labor, Appellant,* v. *Pennington-Winter Construction Company, Inc., a corporation, Appellee* (10 C. A.), decided July 2, 1952 (R. 95-103), is reported in — Fed. (2d) —.

THE QUESTION PRESENTED

Whether the employees of the petitioner in the performance of their duties were engaged "in commerce", or "in the production of goods for commerce", as contemplated by Sections 7 and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended (Act of June 25, 1938, Chapter 676, 52 Stat. 160; U. S. C., Title 29, Sec. 201, *et seq.*).

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended, 52 Stat. 160, 29 USCA, Sec. 201, *et seq.*

STATEMENT

The respondent, Maurice J. Tobin, Secretary of Labor, United States Department of Labor, brought this action against Pennington-Winter Construction Company, a corporation, with its principal office at Oklahoma City, Oklahoma, seeking to enjoin petitioner from alleged violations of the provisions of Sections 7 and 15(a)(2) of the Fair Labor Standards Act of 1938, as amended. These subdivisions of Sections 7 and 15(a)(2) provide that it shall be unlawful for any person to violate any of the provisions of Section 206 or 207 as to minimum wages or overtime pay with regard to workers who are engaged in commerce or the productions of goods for commerce. It is not contended in this case that there was any violation of the minimum wage provisions.

Petitioner is engaged in the heavy construction business with its facilities, employees and services located principally within the State of Oklahoma.

On or about March 15, 1950, petitioner entered into a contract with the Department of the Army through the agency of the Corps of Engineers. The contract required that petitioner perform certain prescribed work in connection with the construction of the Tenkiller Ferry Dam and Reservoir which was to be located on the Illinois River, in

Sequoyah and Cherokee Counties, Oklahoma. The principal features of the work which petitioner agreed to perform in specified areas were clearing a portion of the site of the reservoir, which included:

(a) Removing trees and structures;

(b) Removal of underbrush, debris and fences;

(c) Disposal of cleared materials;

(d) Treatment of cut willow stumps with arborcide to prevent sprouting; and

(e) Construction of brush rows.

The work performed by petitioner was in the reservoir area of the Tenkiller Ferry Dam. This dam and reservoir is entirely within the State of Oklahoma, and is located about 13 miles from the confluence of the Illinois and Arkansas Rivers, the Illinois River being a non-navigable tributary of the Arkansas River, which, in turn, empties into the Mississippi River.

On or about April 10, 1950, petitioner began work in the performance of its contract. From that time and until the completion thereof, on or about June 22, 1951, there were approximately 100 employees engaged in this work. The contract between petitioner and the Corps of Engineers provided specifically that it was subject to the Eight-Hour Law of 1912, as amended, and petitioner complied with the terms of the contract and the Eight-Hour Law. The contract did not provide that the work to be performed was subject to the Fair Labor Standards Act, and petitioner, therefore, did not comply with the Fair Labor Standards Act.

The work of petitioner's employees consisted of:

(a) Clearing and burning the dead wood in the portion of the reservoir below 615 feet above sea level;

(b) Topping all trees extending above the elevation of 615 feet above sea level;

(c) Clearing a strip 19 feet above the elevation of 615 feet by cutting or removing all trees and leaving a stump not more than six inches in height;

(d) Construction of brush rows in certain areas for the purpose of forming shelter and providing locations for the propagation of fish; and

(e) Removing all stone fences projecting above an elevation of 615 feet in the 615-634 foot area.

The strip in which the trees were removed was not a continuous one and certain areas were left intact. These areas were principally along creeks or small streams emptying into the Illinois River and were not cleared in order to provide additional protection for fish and wild-life.

The purposes for which the Tenkiller Ferry Dam was constructed are fourfold: Flood control, generation of electric power, aid to navigation and recreational and other beneficial uses. At the time this case was tried, the dam had not yet been completed and had never been devoted to the uses for which it was being constructed. The District Court found that the hydroelectric features of the dam would not be completed before 1952, and the flood gate would not be installed until sometime in 1953. Likewise, that court found that the Tenkiller Ferry Reservoir is a part of a comprehensive system for the control of the Arkansas and Mississippi Rivers, as approved by the Congress

of the United States. In addition, the court found that the Arkansas and Mississippi Rivers are navigable streams and that this plan for the control of these rivers is intended to and will improve their navigability and their usefulness as channels of interstate commerce; that the Tenkiller Ferry Reservoir will furnish approximately 10 per cent of the water necessary to create and maintain a channel nine feet in depth and 250 feet in width to mile 428 on the Arkansas River; that many concerns engaged in the production of goods for interstate commerce are located, and substantial quantities of cotton and other crops intended for shipment in interstate commerce are located on the flood plains of the Arkansas River, below the confluence of that said river and of the Illinois River; that to the extent that the Tenkiller Ferry Reservoir will control floods and the flow of water in the Arkansas and Mississippi Rivers, it will afford protection from floods to such concerns and crops; that protection will be afforded to interstate railroads and highways by this comprehensive plan of control; that the reservoir will produce power by the use of water turbine generators and the electricity will, on completion of the project, be tied into the existing Southwest Power Network serving Oklahoma, Kansas, Missouri, Arkansas and Texas, among other states, and will move in interstate commerce.

The District Court then concluded:

(a) That the Illinois River, being a non-navigable stream, was not an instrumentality of commerce.

(b) That the Fair Labor Standards Act, as amended, is applicable to employees who are engaged in interstate commerce but not to those whose activities merely affect interstate commerce.

(c) That the test of coverage under the Fair Labor Standards Act is whether or not the activities of the employees affected were so closely related to such commerce as to be in practical and legal contemplation a part of it.

(d) That "new construction" of an instrumentality of interstate commerce is not covered by the Fair Labor Standards Act, as amended.

(e) That the work of employees of petitioner did not include the production of goods in commerce, nor was their work closely related to the production of goods in commerce, nor was their work directly essential to the production of any goods for commerce.

(f) That the work of the employees of the petitioner was primarily related to recreational activities in the area and the propagation and protection of fish and game and would have very little, if any, effect upon interstate commerce.

On appeal by respondent to the Court of Appeals, Tenth Circuit, in a split decision, the majority opinion reversed the District Court. JUDGE ALFRED P. MURRAH filed a dissenting opinion (R. 101-103).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In failing to heed the admonition of the Congress of the United States when it limited the application of the Fair Labor Standards Act, by passage of the 1949 Amendment.

2. In failing to follow the established law of cases with regard to "the new construction" doctrine.

3. In reversing the decision and findings of the District Court that the work of the employees of petitioner was primarily related to recreational activities in the area, and the protection and propagation of fish and game, and that it would have very little, if any, effect upon interstate commerce.

REASONS RELIED ON FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals fails to recognize the Congressional Mandate limiting the scope of the Fair Labor Standards Act by the 1949 Amendment changing the definition of "produced."

The Congress of the United States, by its 1949 Amendment of the Fair Labor Standards Act, changed the definition of "Produced", Section 3(j) of the Act prior to amendment, reading:

> " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any process or occupation necessary to the production thereof, in any State.*"

and, subsequent to the 1949 Amendment, Section 3(j) as amended, reading:

> " 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the pro-

duction of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, *or in any closely related process or occupation directly essential to the production thereof, in any State.*"

This change in definition, substituting "closely related" and "directly essential" to production in lieu of "necessary to the production thereof", as the test for qualification under the Fair Labor Standards Act, was for the sole purpose of limiting the application of the Act, as reflected by Statement of House Conferees Report No. 1453, 81st Congress, pp. 14-15. The Court of Appeals, by its decision in this case, ignores the Mandate of Congress, who, in changing the definition to limit the coverage of the Act, specifically stated that it was changed in order that the "Administrator and the Courts will no longer be able to hold the Act applicable" in cases where the activities involved are not closely related or directly essential to production.

It is the nature of the employee's activities, in the course of his work and not the character of the employer's business, that determines whether the employee is engaged in commerce or in the production of goods for commerce. This Court, in the case of *L. M. McLeod* v. *Threlkeld Commissary Company*, 319 U. S. 491, made the following statement:

> "In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of Federal authority."

Also, at page 497:

> "It is not important whether the employer * * * is engaged in Inter-State Commerce. It is the work of the employee which is decisive."

This case states the test to determine whether an employee is engaged in commerce to be "not whether the employee's activities affect or indirectly relate to interstate commerce but whether they are actually in or closely related to the movement of commerce as to be a part of it."

The Court of Appeals cites *Oklahoma* v. *Atkinson,* 313 U. S. 508, as its authority for holding the Illinois River, a non-navigable stream, to come within the bounds of the commerce clause. That case involves commerce in the constitutional sense. Surely this Court will not permit the Court of Appeals to take the unprecedented step of extending the Fair Labor Standards Act to the limits of constitutional power. Such a decision will cause hundreds of cases defining the limits of the Act to be held for naught. The question to be determined is, are the employees under consideration "engaged in commerce or in the production of goods for commerce?" Determining the scope of these words has involved "the courts in the empiric process of drawing lines from case to case, and inevitably nice lines." *10 E. 40th Street Bldg.* v. *Callus,* 320 U. S. 578-579. In a phrase, this has been the judicial history of the Act.

The intention of Congress may be easily determined from the Statement of House Conferees, Report No. 1453, 81st Congress, pp. 14-15, wherein it is said:

"The following are some examples of cases in which the Administrator and the courts will no longer be able to hold the act applicable because the activities involved in such cases are not closely related or directly essential to production:

"1. A local fertilizer company engaged in selling all of its fertilizer to local farmers within the State for use on land on which sugarcane is grown, which cane is then sold to sugar mills within the State and processed into raw sugar which is sent out of the State. [*McComb, Administrator,* v. *Super-A Fertilizer Works,* 165 F.2d 824 (C. C. A. 1).]

"2. Employees of a quarry engaged in mining and processing stone for local use in the construction of a dike located in the same State and who transport such rock from the quarry to the construction site, where the construction of the dike would have the effect of preventing an oil field that produced oil for commerce from being flooded. [*Schroeder* v. *Clifton,* 153 F.2d 385 (C. C. A. 10) (*Cert.* den. 328 U. S. 858.]

"3. Employees of a local window-cleaning company doing business wholly within the State but many of whose customers are engaged in interstate commerce or in the production of goods for interstate commerce. [*Martine* v. *Michigan Window Cleaning Company,* 327 U. S. 173 (reh'g den. 327 U. S. 816).]

"4. Employees of a local independent nursery concern whose duties included mowing the lawn around the plant of a customer within the State engaged in producing goods for interstate commerce (1944-45, W. H. Man., p. 125).

"5. Employees of a local architectural firm whose activities include the preparation of plans for the alteration of buildings within the State which are used to produce goods for interstate commerce (1944-45, W. H. Man., pp. 138-139).

> "6. Employees of a local exterminator service firm, who work wholly within the State exterminating roaches and other pests in private houses, apartments, hotels, barber shops, colleges, hospitals, and also in buildings within the State used to produce goods for interstate commerce (3 CCH Labor Law Reporter, 4th Ed. No. 25,150.385)."

and it was further stated:

> "All such employees, as well as the employees of the merchant selling his goods locally and employees engaged in providing residential, eating, or other living facilities for factory workers, are quite clearly not performing any activities that are closely related or directly essential to the production of goods."

We particularly call your attention to the fact that the case of *E. C. Schroeder* v. *Clifton,* 153 Fed. (2d) 385, was one of the cases specifically overruled by Congress by reason of the passage of the 1949 Amendment.

II.

The Decision of the Court of Appeals entirely ignores "The New Construction" Doctrine which has long been the established law.

It is petitioner's contention, and the trial court agreed, that petitioner's employees are engaged in original construction of a purely local character. If they are, there is not a case holding such employees to be covered by this Act, because they come under the so-called "new or original construction" doctrine, which stems from the famous case of *Raymond* v. *Chicago M. & St. P. Railway,* 243 U. S. 43, in which a unanimous decision by this Court, speaking

through MR. CHIEF JUSTICE WHITE, held that Raymond, injured while drilling a railroad tunnel through a mountain, was not engaged in interstate commerce because until that railroad line was completed through the mountain and in actual use, it was not in interstate commerce. Is not the topping and cutting of trees and disposal of debris along a non-navigable stream infinitely more remote from interstate commerce? The cases following the *Raymond* case in interpretation of the Fair Labor Standards Act and other Federal laws based on the commerce power are legion,[1] the rule being without exception.

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1. Among cases excluding employees from coverage of Fair Labor Standards Act on basis of original construction doctrine are the following: **McDaniel v. Brown & Root, Inc.,** 172 F. (2d) 466 (construction of a Naval ammunition depot in Oklahoma); **Murphy v. M. T. Reed,** 168 F. (2d) 257 vacated with directions to dismiss those causes of action involving solely construction work at 335 U. S. 865 (construction of a training camp for the Navy and a Naval Advance Base Depot including a barracks, mess halls, railway spurs, etc.); **Parham et al. v. Austin Co.,** 158 F. (2d) 566 (construction of a bomber factory); **Scholl v. McWilliams Dredging Co.,** 169 F. (2d) 729 (construction of airbase in Greenland; draftsmen in New York); **Nieves et al. v. Standard Dredging Corp.,** 152 F. (2d) 719 (dredging channel in bay, building dikes, construction graving dock); **Soderberg v. Birch and Sons Construction Co.,** 163 F. (2d) 37, **cert.** denied, 332 U. S. 816 (contract with government to improve an Aleutian Island by fortification); **Nonan v. Fruco Construction Co.,** 140 F. (2d) 433 (guards at construction site of factory to build munitions for shipment in interstate commerce); **Kelly v. Ford, Bacon and Davis,** 162 F. (2d) 555 (construction of new factory); **Brue v. J. Rich Steers, Inc.,** 60 F. Supp. 668 (building new dry docks at Brooklyn Navy Yard on an arm of the East River, which river has been held to be a stream of interstate commerce); **Crabb v. Weldon Brothers,** 164 F. (2d) 797 (construction work on Alcan highway); **Coomer v. Durham,** 19 Labor Cases 66 (construction of dwelling houses for persons engaged in commerce); **Welks v. Ford, Bacon and Davis,** 6 F.R.D. 606 (building of new plant in Kentucky to produce butadiene, an essential to synthetic rubber); **Trefs v. Foley Brothers,** 84 F. Supp. 159 (constructing small fire arms ammunition factory); **Dollar v. Caddo River Lumber Company,** 43 F. Supp. 822 (construction of saw mill to replace one destroyed by fire); **Baloc v. Foley Brothers,** 68 F. Supp. 533 (both construction of new building and new highway are outside the act); **Collins v. Ford, Bacon and Davis,** 66 F. Supp. 424 (construction of factory); **Englert v. Birch Construction Co.,** 163 F. (2d) 34 (Aleutian Island fortification); **Scott v. Ford, Bacon and Davis,** 55 F. Supp. 982 (construction of factory to build airplane engines);

The "new or original construction" doctrine has long been recognized by the Director of the Wage and Hour Contracts Division, as reflected by his statement of December 3, 1948, as follows: "Workers employed in the 'original construction' of an instrumentality not yet dedicated to use in interstate commerce do not come within the Act's coverage, however, such employees are entitled to the Act's benefits, even though engaged in 'new construction' if the work is undertaken as an improvement or an extension to an existing facility of commerce."

Our courts have recognized the same distinction as set forth in the Director's statement. In the case of *Kam Koon Wan* v. *E. E. Black, Ltd.*, 188 Fed. (2d) 729, the Court of Appeals for the Ninth Circuit stated the rule to be "an employee of a construction contractor is held to be 'engaged in commerce' if his employment involves repair, improvement, or reconstruction of existing instrumentalities of commerce, but not if the employment relates to construction of entirely new facilities." To the same effect are the following: *Scholl* v. *McWilliams Dredging Co.*, 169 Fed. (2d) 729, 732; *Laudadio* v. *White Construction Co.*, 163 Fed. (2d) 383, 386; *Ritch* v. *Puget Sound Dredging Co.*, 156 Fed. (2d) 332, 337; *Walling* v. *Patton-Tulley Transport Co.*, 134 Fed. (2d) 945, 947.

Respondent cited a number of cases in his brief to the Court of Appeals which he contends shows the law to be otherwise. We will distinguish these briefly. In each of the five cases cited by the respondent as an exception to the "original construction" doctrine, it will be seen that repair, maintenance, replacement, addition or improvement of an existing facility of interstate commerce is what is actually

involved, and not new, original construction of a purely local character. These cases are as follows:

1. *Pederson* v. *J. F. Fitzgerald Const. Co.*, 318 U. S. 740, 324 U. S. 720. Here flood torrents had damaged a bridge long used in interstate commerce. The Supreme Court said, "Since the uncontested facts in the record are to the effect that the respondents were actually engaged in *repairing* the abutments and substructures," the employees were engaged in interstate commerce. *Pederson* case, *supra*, at p. 725 (Italics added).

2. To compare *Walling* v. *Patton-Tulley Transport Company*, 134 Fed. (2d) 945, with the instant case, as respondent's counsel has done, is as ridiculous as comparing the Mississippi River with the Illinois River, which is exactly what the comparison necessitates. The basis for decision in *Patton-Tulley* is the fact that "The Mississippi River has been a highway of interstate commerce since the states were first carved out." It is undisputed that the Illinois River is a non-navigable stream. The building and repairing of dikes on the "Father of Waters" is repairing and improving an existing highway of interstate commerce. *Nieves et al.* v. *Standard Dredging Corp.*, 152 Fed. (2d) 719.

3. *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 Fed. (2d) 334, involved the dredging of two channels in the navigable waters of Puget Sound and was held to be a direct and immediate improvement of existing navigable waterways, which it was. To say that the same is true of the Tenkiller Ferry Reservoir or the Illinois River, a non-navigable stream, is preposterous.

No one contends that the Caribbean Sea is non-navigable, yet the Fair Labor Standards Act was held not to apply to dredging and new construction for a naval base on Puerca Bay, Puerto Rico, an inlet of

the Caribbean, because that bay was not an existing instrumentality of commerce. *Neives et al.* v. *Standard Dredging Corp.*, 152 Fed. (2d) 719. "Prior to dredging the shore of Puerca Bay, it was a swampy, almost entirely uninhabited wilderness," hardly "a highway of commerce" as were the Mississippi River and Puget Sound.

4. In *Bennett* v. *V. P. Loftis Co.*, 167 Fed. (2d) 268, a night watchman employed by a contractor engaged in construction of a new bridge which was part of an interstate highway was "engaged in commerce" though no traffic passed over the span while he was so employed. The Court said, "However, this 'new construction' doctrine has no bearing on the instant case, because the bridge here in question, although a new structure, was being built to replace an existing structure which had long been used in interstate commerce."

5. The rationale of *Walling* v. *McCrady Const. Co.*, 156 Fed. (2d) 932, was explained by the same Court in the case of *Kelly* v. *Ford, Bacon and Davis*, 162 Fed. (2d) 255. "In that case (the *McCrady* case) we found that the construction jobs passed upon were all 'integral parts of existing plants' and their purpose was to continue 'the operation of the plants, all of which were producing goods for interstate commerce'." The construction involved improvement to existing instrumentalities of commerce. (Removing old topping and replacing pavement on public roads, new telephone conduit to replace an old conduit, partial replacement of railway bridge, repairing a round house, building a new railway signal tower on an existing line.)

None of these cases involved "original construction" in the sense that phrase is applied as a legal doctrine. The present case does. Here, petitioner's employees were engaged in the initial stages of the project, clearing a por-

tion of a reservoir site where a reservoir had never existed before, same being located on a non-navigable stream. The most that can possibly be said would be that when this reservoir is finally completed it will be used as a plant to manufacture electricity, or that a water factory is being constructed. Original construction of a factory or building of any kind is not covered by the Act.

III.

Respondent's theory that petitioner's employees are engaged in "Protective or Custodial" services, is untenable.

Respondent, in his brief to the Court of Appeals, advances the theory that petitioner's employees are rendering "protective or custodial" services; that guards and watchmen protecting facilities of interstate commerce and factories producing goods for interstate commerce, are covered by the Act, therefore, construction crews clearing a portion of a reservoir site which might some day protect both facilities in, and factories producing goods for interstate commerce are covered by the Act. Petitioner's employees are not interstate flood fighters, they are local employees of a heavy construction company. They would be very much surprised to discover they are rendering "protective or custodial" services. The realm of speculation adopted by respondent as to the effect on commerce by the completion of the Tenkiller Ferry Reservoir is boundless, whereas the courts have adopted a real and practical application of the limits of coverage under the Fair Labor Standards Act. The Act applies to natural persons and not to inanimate matter. Moreover none of the cases respond-

ent relies upon involve original construction.[2] If they had, the guards would not have been covered by the Act.

IV.

This Court has not considered the effect of the 1949 Amendment.

Since the 1949 Amendment, which became effective January 25, 1950, there has been no judicial determination by this Court of the effect of the amendment, and unless such a judicial determination is made, constant litigation and utter confusion to an entire industry will result. The heavy construction industry is affected by this decision and is entitled to a judicial review by this Court.

V.

There are current conflicts between the lower courts with regard to this matter.

In the case of *Dean Skinner et al.* v. *William J. Rogers et al.*, 100 Fed. Supp. 198, JUDGE WILLIAM H. ATWELL, United States District Judge for the Northern District of Texas, held on October 2, 1951, that the employees of the contractors engaged in the construction of Garza-Little Elm Dam and Reservoir, were not engaged in commerce or the production of goods in commerce, and, therefore, were

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2. **Walling v. Sondack,** 132 F. (2d) 77 (Sondack Detective Agency employees guarding "buildings and machinery used to produce goods for commerce"); **Russell Co. v. McComb,** 187 F. (2d) 524 (night watchman guarding big interstate wholesale grocery business); **Lewis v. Florida Power and Light Co.,** 154 F. (2d) 751 (Guards protecting power company property. The Court did not find they were covered by the Act); **Slover v. Wathen,** 140 F. (2d) 258 (night watchmen of pier in harbor of Baltimore City, to which interstate barges were tied for repair while in the water); **Bennett v. V. P. Loftis,** 167 F. (2d) 286 (night watchmen of bridge being constructed to replace bridge which was part of interstate highway).

not covered by the Wage and Hour Law. He held that this original construction work was a purely local activity. His decision, involving the question of workers engaged in the construction of a government dam, is in direct conflict with the decision of the Court of Appeals of the Tenth Circuit in this case.

The *Skinner* case, *supra,* is now pending on appeal in the Court of Appeals in the Fifth Circuit, being Case No. 13935. We respectfully request that decision be withheld on this Application for Writ of Certiorari until such time as that case has been decided in the Fifth Circuit for the reason that if the decision of the lower court is sustained, same will furnish a conflict between Circuits on the question involved in this application.

In addition to the *Skinner* case, *supra,* there are now in process of preparation, if not already filed Petitions for Writs of Certiorari in the following cases: *Maurice J. Tobin, Secretary of Labor,* v. *E. C. Johnson and Leila B. Johnson, d/b/a The Bramhall Company,* decided July 17, 1952 by Court of Appeals for the Eighth Circuit and not yet officially reported; and *Tobin, Secretary of Labor,* v. *Alstate Construction Company,* 195 Fed. (2d) 577, decided by the Third Circuit on April 9, 1952. Both of these cases are in direct conflict with the case of *Adam Thomas, Appellant,* v. *Hempt Bros.,* 371 Pa. 383 (1952), being a decision of the Supreme Court of Pennsylvania. We respectfully submit that in order all questions resulting from the 1949 Amendment may be determined, the prayers of both of the above petitioners should be granted.

VI.

The Decision of the Court of Appeals ignored the recreational features of the work done by petitioner's employees.

The trial court, in its Findings of Fact in this case, determined that the work of the employees of the petitioner was primarily related to the recreational activities in the area, and the propagation and protection of fish and game.

In the contract (R. 64-65), signed by the Department of the Army and petitioner, a section thereof required petitioner to construct brush rows, giving specifications for such construction. This portion of the work contributed solely to the recreational features of the reservoir, namely, furnishing an aid for propagation and protection of fish.

One of the principal purposes of construction of the Tenkiller Ferry Dam is to provide recreational facilities. In the pamphlet introduced in evidence as Petitioner's Exhibit "A", entitled "General Information", published in September, 1948, by Corps of Engineers, United States Army, the recreational features of the lake are discussed. It points out that the Flood Control Act of 1944, as Amended in 1946, authorizes the Department of the Army to "*construct*, maintain, and operate public parks and recreational facilities in reservoir areas under control of the Department of the Army" (Italics added).

This article continues * * * "this legislation also provides that the water areas of such Reservoir shall be open to public use, generally without charge, for boating, swimming, sailing, fishing, and other recreational purposes when such use is determined by the Department of the Army not to be contrary to the public interest" (R. 26).

This exhibit was prepared by Corps of Engineers, Department of the Army, Tulsa District, that being the branch of the United States Government with whom petitioner contracted to furnish the services rendered herein. We quote the above portions of this exhibit to show this Court that the clearing of a portion of the reservoir by petitioner's employees was for the purpose of developing the recreational features of the lake to be formed; that the area cleared from 615 feet to 634 feet above sea level will permit pleasure craft to operate on the lake created by this dam, the testimony being that the normal surface level of the water will be 630 feet above sea level (R. 17).

Such work was not closely related or directly essential to navigation, flood control, the generation of electric power, nor for production of goods in commerce, but was for a purely local purpose, namely, the recreational use of the lake, as the lower court found from the evidence introduced before him in the trial of this case.

Judge Murrah, in his dissenting opinion, pointed out that the record does not support the conclusion that petitioner's employees were engaged in an occupation "closely related or directly essential to the production of goods"; that the trial court found and concluded from the evidence that the work of the employees was "primarily related to recreational activities in the area and the propagation and protection of fish and game and will have very little, if any, effect upon Interstate Commerce"; that this finding is supported by the record, is not clearly erroneous, and should not be set aside.

CONCLUSION

It is respectfully submitted that there is here presented a proper occasion for the exercise of the supervisory powers of this Court and that this petition should be granted and the case reversed.

Respectfully submitted,

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October, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 380

PENNINGTON-WINTER CONSTRUCTION COMPANY, A CORPORATION, PETITIONER

v.

MAURICE J. TOBIN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 6–12) are not reported. The opinion of the court of appeals (R. 95–103) is reported in 198 F. 2d 334.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered July 2, 1952 (R. 103). A petition for rehearing, filed

July 21, 1952, was denied August 2, 1952 (R. 108). The petition for certiorari was filed on October 6, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether employees engaged in the reservoir clearance work on a multiple purpose navigation, flood control and power project, as part of a comprehensive plan for the improvement of the Arkansas and Mississippi Rivers, are "engaged in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act of 1938, as amended.

STATUTE INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060, c. 736, 63 Stat. 910, 29 U. S. C., Supp. V, 201 *et seq.*) are:

> SEC. 3. As used in this Act—
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall

be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

* * * * *

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT

The Secretary of Labor brought this action in the District Court for the Eastern District of Oklahoma to enjoin petitioner from violating sections 7 (a) and 15 (a) (2) of the Fair Labor Standards Act of 1938 by failing to pay time-and-a-half for hours worked by its employees in excess of 40 hours a week (R. 2). The employees in question were employed under a contract between petitioner and the Government to clear the reservoir for the Tenkiller Ferry Dam project. The dam is being constructed on the Illinois River in

Oklahoma about 13 miles north of the confluence of the Illinois and Arkansas Rivers. (R. 75.) The Illinois River is a tributary of the Arkansas River which empties into the Mississippi River (R. 7, 57). The Tenkiller Dam is a multiple-purpose project for flood control, navigation, power and other related purposes (R. 8). It is an integral part of a comprehensive system for the control of the Arkansas and Mississippi Rivers as recommended by the Corps of Engineers (Flood Control Committee Document No. 1, 75th Congress, 1st Session; House Document No. 758, 79th Congress, 2d Session), and it was authorized by Congress under its power to regulate commerce (Flood Control Act of June 28, 1938, Public Law 761, 75th Congress, 3d Session (52 Stat. 1215), as amended by the River and Harbor Act of July 24, 1946, Public Law 525, 79th Congress, 2d Session (60 Stat. 634)).

The Arkansas and Mississippi Rivers are both navigable, and, as found by both courts below, the comprehensive plan for the control of the Mississippi and Arkansas Rivers "is intended to and does improve their navigability and their usefulness as channels of interstate commerce, and said comprehensive plan is intended to and will provide a channel nine feet in depth and 250 feet in width to mile 428 on the said Arkansas River" (R. 9, 96). It is also undisputed that the "Tenkiller Ferry Reservoir is intended to and

will furnish approximately ten per cent of the flow of water necessary to create and maintain such channel." *Ibid.* With respect to flood control, both courts below found (R. 9, 96), that "Many concerns engaged in the production of goods for interstate commerce are located, and substantial quantities of cotton and other crops intended for shipment in interstate commerce are located in the flood plains of the Arkansas River below the confluence of said river and of the Illinois River. To the extent that the Tenkiller Ferry Reservoir controls the floods and the flow of water in the Arkansas and Mississippi Rivers, it will afford protection from floods to such concerns and such crops." The extent and serious nature of the floods in the plains of the Arkansas River, particularly below the mouth of the Illinois are described in detail in House Document 758, *supra,* page 6.

The trial court also found that there was an "existing Southwest Power Network serving Oklahoma, Kansas, Missouri, Arkansas and Texas, among other states," and that the hydroelectric features of this project would "add in excess of one hundred million kilowatt hours of electrical output to said network," which increased production would "move in interstate commerce" (R. 10).

The contract with the United States Department of the Army, under which the reservoir

clearance work was performed, called for the clearance of two zones, Zone A and Zone B, for a total amount of $698,360. Of this amount, almost two-thirds ($427,380) was for the clearance of Zone A, and the remainder ($270,980) for the clearance of Zone B (R. 60). The Zone A work included the area from the bottom of the reservoir to elevation 615.0 and required the removal of all floatable material, described in the contract as "pieces four inches or more in diameter and five feet or more in length," as well as all dead and leaning trees likely to break loose and float (R. 64). It also required the topping of all anchored structures, including fences, living trees and brush to elevation 615, except in certain small areas "blocked out" on the Plans for Reservoir Clearing (attached to stipulation introduced as plaintiff's exhibit No. 1; also R. 46–48). The Zone B clearing was performed between elevation 615.0 and 634.0. In addition to requiring the removal of all floatable material and the topping of trees except those in the "blocked out" areas, if provided for the construction of brush rows at designated locations. (R. 65, 67.) The contract provided that this brush row work "will not be measured for separate payment, but shall be considered as a subsidiary obligation of the contractor covered by the contract job sum price" for clearing Zone B (R. 65).

While this subsidiary brush row work was admittedly for the purpose of aiding the propa-

gation of fish, the evidence of the two Army Engineers who testified established that the most important benefit of the clearance work as a whole was to free the lake from floating timber that might clog up and interfere with the flood spillway and flood gates or with the hydro-electric intakes (R. 14, 20–22, 30–33). As stated by the court of appeals, "the unimpeached testimony of the Assistant Chief Engineer and the Hydro-electric Engineer" was "that the major portion of the work in question consisted of removing trees, logs and obstructions which would float against the dam, tend to clog the intakes, damage the gates, and interfere with the operation of the hydro-electric power equipment and the spillway for the flood pools" and that "The only work solely for recreational activities was the construction of brush rows for the propagation and protection of fish and the removal of certain obstructions in the upper levels of the dam" which was "a very small part of the project and of the work done by the appellee" (R. 97, 98, 19–22, 30–33, 40–43).

The district court held that the project "is a valid exercise of commerce power by Congress," but held the Fair Labor Standards Act inapplicable on the grounds that the work in question "was primarily related to recreational activities in the area, and the propagation and protection of fish and game and will have very little, if any, effect upon interstate commerce" (R. 10–11).

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The court of appeals reversed (R. 95–106) on the ground that the work of removing trees and obstructions in the lake bed which might break loose and float against the dam and interfere with its operations was "as much a necessary and essential part of the construction of the dam" (R. 98) and "as directly and intimately connected with the project and as closely related thereto and its basic functions" as any of the other work on the project (R. 100–101); and since the dam was "an improvement of an existing project for the control of floods and the betterment of navigation" (R. 99)—"no more than an addition to, or an improvement of, an existing instrumentality of interstate commerce" (R. 100)—such work was within the coverage of the Act.

ARGUMENT

The decision below correctly applies the principles established by decisions of this Court and does not conflict with the decision of any United States Court of Appeals. However, since the case involves an important question as to the application of the Act which has not specifically been determined by this Court, and in view of the pendency of other cases[1] presenting the same or

[1] *Skinner* v. *Rogers*, 100 F. Supp. 198 (N. D. Texas) now pending on appeal in the Fifth Circuit, No. 13935; *Tobin* v. *Ramey dba Hughes Construction Co.*, 106 F. Supp. 349 (W. D. La.), on appeal to the Fifth Circuit but not yet docketed, the notice having been filed October 24, 1952.

similar questions, and the likelihood that such questions may be raised in additional cases involving similar river development projects,[2] a determination of the issue by this Court would seem warranted. Therefore, we do not oppose certiorari.

1. The decision below correctly resolved the question here presented by applying principles established by this Court's decisions in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, *Overstreet* v. *North Shore Corporation*, 318 U. S. 125, *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 318 U. S. 740, modified and petition for rehearing denied, 318 U. S. 742; *Fitzgerald Co.* v. *Pedersen*, 324 U. S. 720, and *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508. In the *Jacksonville Paper* case, the "in commerce" coverage of the Act was held to extend "throughout the farthest reaches of the channels of interstate commerce" (317 U. S. at 567). In the *Overstreet* case the Act was held applicable to employees engaged in the maintenance and improvement of existing instrumentalities of inter-

[2] See Public Law 504, 82d Congress, 2d Sess., 66 Stat. 579, appropriating funds for about 100 river and harbor improvement and flood control projects for the fiscal year ending June 30, 1953. See Statement of the Managers on the Part of the House (Report No. 2497, 82d Congress, 2d Sess.) for a list of these various projects. This list includes the Bull Shoals Reservoir on the White River on which, as found by the district court, petitioner in the instant case is currently working under a contract with the Corps of Engineers (R. 10, Fdg. 17).

state commerce on the ground that such work "in providing a means of interstate transportation and communication is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it'" (318 U. S., at 130). These principles were applied in the *Pedersen* case to hold covered employees constructing "entirely new" abutments to an interstate railroad bridge (324 U. S., at 724). While the *Atkinson* case did not involve the Fair Labor Standards Act, its recognition of the close and integral relation of the type of project here involved to the improvement and maintenance of the existing interstate navigable channels, plainly indicates the applicability to such a project of the principles of the *Overstreet* and *Pedersen* decisions.

The project here involved is indisputably designed for the improvement of existing interstate channels of commerce. It is concededly part of a comprehensive plan for the improvement and control of two navigable rivers, and it will furnish approximately 10% of the flow of water necessary to maintain and extend the navigable channel in the Arkansas River (R. 9). The flood control aspects of the project further evidence its character as an improvement of existing instrumentalies of commerce.

It has long been recognized by the courts that a flood-control program is inseparably related to the stabilization and maintenance of the navigability

of river channels; that the structure which holds back the water in time of flood, thereby protecting commerce and navigation itself, at the same time confines a better regulated flow of water in the stream, increases velocities, and scours and deepens channels. See *Jackson* v. *United States,* 230 U. S. 1, 15, 18, 19; also, *Oklahoma* v. *Atkinson Co.,* 313 U. S. 508, at 522–523 ("a part of the local benefits of flood control is frequently protection of navigation * * *"); *United States* v. *Appalachian Electric Power Co.,* 311 U. S. 377, 426 ("Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control"), and *United States* v. *West Virginia Power Co.,* 56 F. Supp. 298, 302 (S. D., W. Va., 1944) ("control of floods in navigable rivers is of itself essentially control of navigation").

Two United States Courts of Appeals have specifically held improvements of interstate waterways to be within the "in commerce" coverage of the Act. *Walling* v. *Patton-Tulley Transp. Co.,* 134 F. 2d 945 (C. A. 6) (construction of new dikes and revetments on the Mississippi River); *Ritch* v. *Puget Sound Bridge & Dredging Co.,* 156 F. 2d 334 (C. A. 9) (improvement of the navigable harbor by the dredging of new channels and construction of new piers). In those cases the structures were constructed on the navigable river or channel itself; here they are physically removed

from the navigable channel. But that difference cannot be deemed controlling. As this Court's decision in the *Atkinson* case recognizes,[3] modern engineering study shows that flood control and improvement to navigation can often be more efficiently and effectively accomplished by a comprehensive plan involving structures removed from the navigable portion of the river itself, such as dams and reservoirs on tributaries. Such structures are not any the less vital or closely related to the commerce. As the court below said, "The construction of levees, dams and other improvements on any of the streams within the watershed of the Missouri and Mississippi Rivers, constructed for the purpose of aiding navigation and preventing floods, must be considered as items of a single project undertaken to effectuate such purposes." (R. 100.) Such a single project cannot be divided up, for purposes of the Act's coverage, by artificial distinctions based on the physical proximity of particular activities to the navigable stream.

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[3] Contrary to the assumption of dissenting Judge Murrah in the instant case (R. 101), the majority opinion did not cite the *Atkinson* case on the premise that the Fair Labor Standards Act coverage is co-extensive with the constitutional power of Congress, but only to demonstrate that a navigation improvement and flood control project is no less related to commerce because constructed on a nonnavigable tributary rather than upon the navigable stream itself, and that a comprehensive plan for improving a river system must be viewed as a whole and not as separate isolated segments.

Petitioner's reliance on the 1949 Amendment to Section 3 (j) of the Fair Labor Standards Act (Pet., pp. 8–12) is wholly irrelevant to the "in commerce" phase of coverage on which the decision below is primarily predicated. While the 1949 Amendments did somewhat restrict the scope of Section 3 (j) of the Act, they in no way curtailed the "in commerce" basis of coverage as defined in Section 3 (b) of the Act. On the contrary, the only modification of this phase of coverage was to *expand* it to some extent. Whereas the original definition of commerce was limited to commerce between states, plus outgoing foreign commerce, the new definition in Section 3 (b) includes also *incoming* foreign commerce. The previous definition referred to commerce "from any State to any place outside thereof." The amendment substituted "*between* any State *and* any place outside thereof." [Emphasis supplied.] Thus there is no basis whatsoever for petitioner's suggestion that the *Jacksonville Paper, Overstreet, Pedersen, Patton-Tulley,* or *Ritch* decisions (all of which rested on the "in commerce" basis of coverage) were in any way modified by the 1949 Amendments to Section 3 (j) of the Act.[4] All of the cases cited by petitioner in

[4] On the contrary, the fact that the Act was comprehensively considered and many of its provisions amended without any limitation being placed on the scope of the section involved in these cases is indeed strong evidence of Congressional reaffirmance of the decisions. See *Brewster* v. *Gage*,

its excerpt from the statement of the House Conferees on the 1949 Amendments (Pet., pp. 11–12) were decisions resting solely on the definition of "produced" in Section 3 (j).[5]

2. Equally untenable is petitioner's argument based upon the so-called "new or original construction" doctrine (Pet., pp. 12–17). As pointed

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280 U. S. 327, 337; *Helvering* v. *Reynolds Co.*, 306 U. S. 110, 114–115; *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U. S. 361, 366.

[5] An additional argument in support of coverage in the instant case, resting on the "production for commerce" basis, was presented to the court below, but its decision did not rest on this ground. This argument, which we still submit is an additional sound basis for holding petitioner's employees within the coverage of the Act, is that the flood control aspects of the project are equivalent to "protective or custodial" services to producers of goods for commerce, which have consistently been held to be within the scope of the definition of Section 3 (j) of the Act. *Mid-Continent Pipe Line Co.* v. *Hargrave*, 129 F. 2d 655 (C. A. 10); *Walling* v. *Sondock*, 132 F. 2d 77 (C. A. 5); *Russell Co.* v. *McComb*, 187 F. 2d 524 (C. A. 5); *Lewis* v. *Florida Power & Light Co.*, 154 F. 2d 751 (C. A. 5); *Slover* v. *Wathen*, 140 F. 2d 258 (C. A. 4); and *Bennett* v. *Loftis Co.*, 167 F. 2d 286 (C. A. 4).

It is our view that these decisions were not affected by the 1949 Amendment to Section 3 (j) and that they are still authoritative. Two of the decisions (*Walling* v. *Sondock* and *Slover* v. *Wathen*) were specifically mentioned with approval, and none of them were included in either the Senate or House Reports among the decisions intended to be modified by the Amendment. See the Report of the Majority of the Senate Conferees citing the *Sondock* and *Slover* cases, along with the other similar cases, in connection with the statement that "protective or custodial services for producers of goods" are "closely related and directly essential to production" [the amended language of section 3 (j)]. 95 Cong. Rec. 14874–5.

out by the court below, the project here "is not new construction in the sense that a new building for the manufacture of goods for commerce is new construction. Such a building by its mere construction is no part of commerce * * *. It does not follow from the mere construction of such a building that it ever will have connection with commerce or be dedicated to the production of goods for commerce" (R. 98–99). On the other hand, the construction of the project here involved necessarily improves and becomes a part of the *presently existing* project for development of the Arkansas and Mississippi Rivers which are and long have been *existing* instrumentalities of commerce. This point was specifically and persuasively decided by the Sixth Circuit in the *Patton-Tulley* case, *supra:*

> The short answer is that the Mississippi River has been a highway of interstate commerce since states were first carved out of its contributory territory, and so the reasoning that construction upon a highway not yet utilized for interstate commerce is not work in interstate commerce does not apply [134 F. 2d 945 at 947].

Thus, also, in *Ritch* v. *Puget Sound Bridge and Dredging Co.,* 156 F. 2d 334 (C. A. 9) the work held covered included the dredging of new channels and the construction of a new pier with retaining walls. These decisions accord with this Court's decision in *Pedersen* v. *J. F. Fitz-*

gerald Const. Co., 318 U. S. 740, 324 U. S. 720, 724, holding the Act applicable to the construction of "entirely new" abutments to a railroad bridge. See also *Walling* v. *McCrady Const. Co.,* 156 F. 2d 932 (C. A. 3), certiorari denied, 329 U. S. 785, holding the Act applicable to the extension of an existing telephone communications system by the "construction of a new conduit," the court pointing out that much of the work involved in the *Pedersen* case, *supra,* was "of the type of so-called 'new construction'." 156 F. 2d at 936; *Bennett* v. *Loftis Co.,* 167 Fed. 2d 286 (C. A. 4), holding the Act applicable to an employee guarding the construction of a new bridge which was being constructed some distance away from the existing interstate highway, with which the bridge upon completion was to be connected.

The above decisions establish that the fact that work may be characterized as "new" construction does not afford a "touchstone" for determining coverage under this Act. That there is no such "dependable touchstone" is clear from one of this Court's earliest decisions under the Act (*Kirschbaum Co.* v. *Walling,* 316 U. S. 517) as well as from its most recent decisions. Since the Act provides no exemption for construction work, however it may be characterized, and since this Court has repeatedly held that exemptions may not be supplied by implication (*Powell* v. *United States Cartridge Co.,* 339 U. S. 497, 517; *Addison* v. *Holly Hill Co.,* 322 U. S. 607, 617, rehearing

denied 323 U. S. 809), the determination of coverage in each case must rest upon the particular facts showing the relationship of the construction work to existing interstate commerce and production for such commerce.

3. Contrary to petitioner's assertion (Pet., pp. 20–21), the court of appeals did not ignore the recreational features of the work done by petitioner's employees. The court carefully reviewed the "unimpeached testimony of the Assistant Chief Engineer and the Hydro-Electric Engineer" (R. 98) and correctly concluded that "the evidence is clear that the recreational facilities were a very small part of the project and of the work done by the appellee [petitioner]" (R. 97–98). The construction of the brush rows in Zone B was the only part of the work that could reasonably be characterized as primarily for recreational purposes. This aspect of the work was expressly recognized in the contract "as a subsidiary obligation," for which no separate payment was to be made; and moreover it was included in the portion of the contract to which only about one-third of the total price was allocated. That the actual clearing work performed by petitioner's employees had little connection with the recreational features is confirmed by the fact that the tree growth in certain areas was not removed or cut but was left standing at the request of the fish and wildlife authorities (R. 43), and this obviously required no work on the

part of the employees. The plain fact from the contract itself, from appellee's own exhibits, as well as from the undisputed testimony of the engineers, is that the reservoir clearance work, costing well over one-half million dollars, was not performed primarily for recreational purposes but for the efficient operation of the project for navigation, flood control and power purposes.

CONCLUSION

While we think the decision below is correct and that the petition presents no problem that may not be resolved by applying principles already well established, in view of the pendency of other cases raising similar problems and the likelihood of additional litigation on the same or similar issues, authoritative determination of the question at this time would seem desirable. Therefore, we do not oppose the petition for certiorari.

Respectfully submitted.

ROBERT L. STERN,
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